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No. 300

In the
Supreme Court of the United States
OCTOBER TERM, 1947

MRS. LIZZIE B. HOOD, *et al.*,
Petitioners,

v.

THE TEXAS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, CAUSE NO. 11,792, THE TEXAS COMPANY, APPELLANT v. LIZZIE B. HOOD, ET AL., APPELLEES, AND SUPPORTING BRIEF.

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WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Harwood-9310

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Statutes:

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THE TEXAS COMPANY,

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioners, Mrs. Lizzie B. Hood, Mrs. Nancy I. Browne and her husband, Charles I. Browne, appellees in Cause No. 11,792, United States Circuit Court of Appeals, Fifth Circuit, The Texas Company, appellant, v. Lizzie B. Hood, et al., appellees, respectfully apply to this Honorable Court to issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit to the end that such cause may be reviewed, the judgment of the Circuit Court on divided opinion, reversing the judgment of the trial court and setting aside the jury's verdict in their favor, be reversed, the jury's verdict upheld and the judgment of the trial court affirmed.

SUMMARY STATEMENT OF THE CASE

James Alexander Hood, the husband of the petitioner, Lizzie B. Hood, was instantly killed shortly after dark on November 28, 1944, when the automobile operated by him and a truck owned and operated by respondent, The Texas Company, collided on a paved highway in Delta County, Texas. (R. 2-15.)

Based on the verdict of the jury (R. 23), the trial court entered judgment in favor of the petitioners for the total sum of Fifteen Thousand Dollars. (R. 23-24.) The Circuit Court of Appeals for the Fifth Circuit, McCord, Circuit Judge, dissenting, reversed the judgment of the trial court (R. 263), and on May 31, 1945, denied petitioners' motion for rehearing. (R. 278.)

This is an action at common law for damages resulting to the petitioners because of the death of James Alexander Hood. The collision in which he lost his life occurred in Delta County, Texas, and the suit was filed in the State District Court of that county. The suit was for an amount in excess of Three Thousand Dollars, and The Texas Company, respondent herein, a corporation, incorporated under the laws of the State of Delaware, perfected removal to the United States District Court, Eastern District of Texas, Paris Division. (R. 16.)

Upon a trial on the merits before the court and a jury, the jury returned a verdict in favor of petitioners in the sum of Fifteen Thousand Dollars (R. 23), and based on this verdict a judgment was rendered in their favor for that amount. (R. 23-24.)

Seasonable appeal was perfected to the Circuit Court of Appeals, Fifth Circuit, and that court in a divided opinion, Circuit Judge McCord dissenting, reversed the judgment of the trial court and remanded the cause for further proceedings not inconsistent with the views expressed in the majority opinion. The majority opinion held in effect (a) that the only eye witnesses to the accident were the three employees of Texas Company riding in the truck and that their testimony was clear, unequivocal, uncontradicted and unimpeached by the circumstances in evidence (R. 265), (b) that the witnesses are by no means agreed as to the circumstances by which Mrs. Hood sought to justify her allegations or negligence on the part of Texas Company (R. 264), (c) that the circumstance that the truck may have been 200 or more feet from the point of collision is without any significance, and that no imputation of excessive speed can be drawn from this circumstance in the light of the undisputed testimony (R. 266), (d) that in order to sustain petitioners' allegations of negligence, it would not only be necessary to presume negligence on the part of the driver of the Texas Company's truck and that such negligence was the proximate cause of injury resulting in the death of the deceased, but that it would be necessary to presume that the three eye witnesses testifying as to how the accident occurred swore falsely (R. 268, 269) and (e) that the verdict of the jury and the judgment were predicated on conjecture alone and that the motion of Texas Company for a directed verdict should have been sustained. (R. 269.)

Circuit Judge McCord held in his dissenting opinion (a) that if the evidence of the three occupants of the truck

was true, that the truck was moving on its extreme right side of the road, *no accident could have happened, as in fact it did*, near the marked center line of the highway, and that the jury was therefore warranted in disregarding the evidence of these witnesses (R. 269-270), (b) that every physical fact indicated that the Texas Company truck was travelling at a rapid rate of speed (R. 270), (c) that the place of impact on the body of the automobile, and the debris, oil spots and marks at and to the left of the center line of the highway, permitted a finding that the accident occurred near the center of the highway and on the Texas Company truck's *wrong* side of the road (R. 270), (d) that the physical facts cast doubt upon the testimony of the three occupants of the truck (R. 271), (e) that the jury weighed all the evidence and found that the physical facts spoke louder and truer than did the testimony of respondent's witnesses (R. 271), (f) that the Circuit Court by majority opinion took the printed record and credited the testimony of witnesses for the defendant in the court below and brushed aside the considered verdict of the jury (R. 271), (g) that the majority opinion decided the case as if the Circuit Court were a jury trying the case and weighing the evidence and drawing inferences therefrom for the first time (R. 271) and that (h) it was an "undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite to the one reached by the jury." (R. 271.)

OPINION BELOW

The opinion of the Circuit Court is reported, *161 F. (2d) 618*, the majority opinion page 618 and the dissenting opinion by McCord, Circuit Judge, page 620. No opinion was written by the trial court.

STATEMENT OF JURISDICTION

This court is authorized by *Section 240 of the Judicial Code, as amended (36 Stat. 1157, 43 Stat. 938; 28 U. S. C. A. Sec. 347)* to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal [28 U. S. C. A., sec. 347(a)]."

The judgment of the Circuit Court was rendered on May 9, 1947. (R. 272.) A timely motion for rehearing (R. 273) was denied by that court on May 31, 1947 (R. 278), and this petition for review on writ of certiorari will be filed "within three months" thereafter, as required by Section 8 of the Act approved February 13, 1925 *(43 Stat. 940; 28 U. S. C. A. Sec. 350)* as construed by this court in *Gypsy Oil Company v. Leo Bennett Escoe, a Minor, by O. W. Stephens Guardian, 275 U. S. 498-499*, and *Department of Banking of Nebraska, Receiver v. Pink, Superintendent of Insurance of the State of New York, 317 U. S. 264, 266.*

Petitioners adopt the foregoing summary statement of the case pages 2-4 as a part of this jurisdictional statement.

QUESTIONS PRESENTED

The questions on which a review is sought presented by the majority opinion of the Circuit Court of Appeals, by the dissenting opinion of Circuit Judge McCord, and by the record in this case are:

1. May a Circuit Court of Appeals on an appeal of a common law action from a United States District Court usurp the function of a jury and substitute findings of fact by such appellate court for the verdict of the jury rendered in the court below?

2. May the Circuit Court of Appeals on an appeal of a common law action from a United States District Court, such action arising in Texas, take the printed record, credit the testimony of witnesses for the defendant and brush aside the considered verdict of the jury?

3. May the Circuit Court of Appeals reviewing on appeal a jury verdict and judgment of a United States District Court in a Texas case, weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite to the one reached by the jury?

4. Where the testimony of eye witnesses to a truck and automobile collision on a Texas highway is inconsistent, one with the other, and all are employees of the truck owner, may the jury base their verdict upon proved physical facts surrounding the accident and disregard the testimony of such witnesses as to what caused the accident and

as to where it occurred in relation to the center of the highway?

5. May the testimony of eye witnesses involved in a highway accident be impeached by proved circumstances and physical facts rendering the correctness of their statements improbable, both (a) as to where and how a collision between a truck and automobile occurred, and (2) as to the speed of the truck at the time of the collision?

6. Should the rule announced in *Lavender v. Kurn, 327 U. S. 645, at 653, S. Ct. 740, at 744* and the decisions therein cited,

> "Where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable"

be followed by the Circuit Court of Appeals in a common law action arising in Texas and appealed from a United States District Court?

7. Is a jury in a United States District Court in Texas trying and determining facts in the trial of a common law action based upon allegations of negligence entitled to draw reasonable inferences from circumstances proved and disregard testimony of eye witnesses inconsistent with their findings?

8. Where the employee occupants of a truck involved in a highway accident in Texas testified that the truck

was moving on its extreme right side of a paved road 34 feet wide at the time of a collision, such testimony, if true, rendering impossible the happening of the collision at the place it did happen, was the jury authorized to discredit such testimony and base their verdict upon proved physical facts showing that the truck was being operated at an excessive rate of speed on its wrong side of the road proximately causing the collision?

9. May a jury draw an inference of excessive speed of a heavy truck travelling upon a paved highway and of negligence by reason of such speed upon the proved and admitted circumstances that following a collision with a light automobile, the truck travelled uphill for a distance of more than 200 feet while turning over one or more times and came to rest off the road on its extreme wrong side with the occupants and driver having the feeling that they were being whirled through space and finding themselves following the collision thrown to the ground in front of and on different sides of the truck at rest?

10. Should a jury verdict in favor of plaintiffs in a Texas common law action removed from the State Court and tried in a United States District Court be set aside and a take nothing judgment entered for defendant on motion for instructed verdict, where the driver and occupants of a heavy truck (R. 149) involved in a highway accident with a light coupe automobile, all employees of the truck owner and sole surviving witnesses, testified that they were travelling upon their extreme right side of a concrete and rock highway (R. 163) 34 feet wide (R. 92), at a speed

of between 30 and 40 miles per hour (R. 151) when the driver of the coupe pulled his car across the center stripe into their truck, and the proved physical facts and circumstances in connection with the collision were: (a) the collision occurred near the center and on the truck's wrong side of the highway (R. 65, 66, 81, 85, 94); (b) the coupe was struck on its left side with the force of the blow extending at an angle toward the rear and other side thereof (R. 199, 55, 56); (c) the truck while turning over and whirling through space (R. 153) travelled, uphill (R. 124, 127, 149), 200 feet or more and came to rest in the bar ditch off its extreme wrong side of the road (R. 65, 77, 167); (d) the occupants of the truck were respectively thrown to its left, its right, and in front at the point it came to rest (R. 153, 158, 168); (e) the light coupe remained upright with the deceased at the steering wheel on its right side of the paved portion of the highway (R. 41), not more than 12 or 15 feet from the point of impact as fixed by petitioners' witnesses (R. 65, 95); (f) the truck weighed 7,000 to 8,500 pounds (R. 68, 149) and the 1934 Chevrolet weighed 2,800 to 3,000 pounds (R. 68), and (g) debris from the truck was scattered between the automobile at rest on its right side of the road and the truck at rest on its wrong side of road (R. 137, 138), this admitted by truck driver (R. 156)?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioners respectfully submit that this application for a writ of certiorari should be granted for each of the following reasons:

1. To give full force and effect to the existing appellate authority of the Supreme Court of the United States in the furtherance of justice.

2. That the judgment of the Circuit Court of Appeals is in conflict with the decisions of this Honorable Supreme Court in the cases of *Tennant v. Peoria & P. U. Ry. Co., 64 S. Ct. 409, 321 U. S. 29; Lavender v. Kurn, et al., 66 S. Ct. 740, 327 U. S. 645; Myers v. Reading Co., 67 S. Ct. 1334; Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444; and T. & P. Ry. Co. v. Cox, 145 U. S. 593, 12 S. Ct. 905, at 909.*

3. The judgment of the Circuit Court of Appeals, which involves questions of local law, is in conflict with decisions of the Supreme Court of the State of Texas in the cases of *Houston Railway Company v. Runnels, 47 S. W. 971; Houston E. & W. T. R. Co. v. Boone, 105 Tex. 188, 146 S. W. 533; Bock v. Fellman Dry Goods Co., 212 S. W. 635; Burlington, Rock Island Ry. Co. v. Ellison, 140 Tex. 353, 167 S. W. (2d) 723; Lockley v. Page, 180 S. W. (2d) 616, at 618,* and *Stephens, et al. v. Karr, 33 S. W. (2d) 725.*

4. The decision of the Circuit Court of Appeals in this case is in conflict with the decisions of other Circuit Courts, to-wit:

(a) The Circuit Court of Appeals, Sixth Circuit, in the case of *Highfill v. Louisville & Nashville R. Co., 154 Fed. (2d) 874.*

(b) The Circuit Court of Appeals, Seventh Circuit, in the case of *Griswold v. Gardner, 155 Fed. (2d) 233.*

(c) The Circuit Court of Appeals, Fourth Circuit, in the case of *Melville v. State of Maryland, et al., 155 Fed. (2d) 440.*

(d) The Circuit Court of Appeals, First Circuit, in the case of *Boston & M. R. R. v. Meech, 156 Fed. (2d) 109.*

5. The importance of the question to the bench and bar generally as to whether or not the rules laid down by this court in *Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444,* and followed in such cases as *Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409; Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740,* and *Myers v. Reading Co., 67 S. Ct. 1334,* apply only to actions arising under the Federal Employers' Liability Act, or do they apply as well in actions of this character.

6. The Circuit Court on majority opinion misinterpreted and misapplied the decision of this court in *Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333, 53 Sup. Ct. 391, 77 L. Ed. 819,* and the opinion and judgment of the Circuit Court are in conflict with such decision.

7. The Circuit Court on majority opinion misinterpreted and misapplied the decision of the Supreme Court of Texas in *International Travelers Association v. Bettis, 35 S. W. (2d) 1040* and the opinion and judgment are in conflict with such decision.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, com-

manding that court to certify and send to this court a full and complete transcript of the record and proceedings in said Circuit Court in the case on its docket numbered 11,-792, entitled "*The Texas Company, appellant, v. Lizzie B. Hood, et al., appellees,*" to the end that said cause may be reviewed and determined by this court as provided by the Statutes of the United States, the judgment of the Circuit Court reversed, and the judgment of the District Court affirmed; and they pray for such other and further relief as this court may deem proper.

Respectfully submitted,

W. F. MOORE,
Paris, Texas,
Attorney for Petitioners.

No.....

In the

Supreme Court of the United States

OCTOBER TERM, 1947

MRS. LIZZIE B. HOOD, *et al.*, *Petitioners,*

v.

THE TEXAS COMPANY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Supreme Court of the United States:

As permitted by Rule 38, petitioners attach this supporting brief to their petition for writ of certiorari.

OPINION IN THE COURT BELOW

The opinion of the Circuit Court is reporter, 161 F. (2d) 618, the majority opinion Page 618 and the dissenting opinion by McCord, Circuit Judge, Page 620. No opinion was written by the trial court.

GROUNDS OF JURISDICTION

Petitioners adopt, as their grounds of jurisdiction, the jurisdictional statement on pages 2-6, inclusive, of the foregoing petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners adopt, as their statement of the case, the **Summary Statement of the Case,** page 2, and **Statement of Jurisdiction,** pages 2-6, inclusive, of the foregoing petition for a writ of certiorari.

SPECIFICATION OF ASSIGNED ERRORS

Petitioners respectfully submit that the Circuit Court on majority opinion with dissenting opinion by McCord, Circuit Judge, committed the following errors:

1. The Circuit Court erred in entering a judgment (R. 272) reversing the judgment of the District Court and remanding this cause to the District Court for further proceedings not inconsistent with the views expressed in the majority opinion, such majority opinion being that the motion of Texas Company for a directed verdict should have been sustained.

2. The Circuit Court, by majority opinion, erroneously found that the circumstances proved by plaintiffs as establishing negligence and proximate cause on the part of defendant are consistent with the positive testimony of defendant's witnesses, Johnson, Partain and Minor, the occupants and driver of defendant's truck involved in the collision (R. 267), and erred in basing decision upon such finding.

3. The Circuit Court, by majority opinion, erroneously holds that the truck of defendant, The Texas Company, was without a driver to bring it to a halt following the collision (R. 266), since the uncontradicted evidence was that

Johnson, the driver, was on the ground beside and in front of the truck at the place it came to rest after the collision., (R. 153), and erred in basing decision upon such finding.

4. The Circuit Court, by majority opinion, erroneously holds that the distance traveled uphill by defendant's truck, following the collision, did not constitute a circumstance upon which the jury was entitled to base an inference of excessive speed (R. 266), and erred in basing decision upon such finding.

5. In view of the proved circumstances rendering the correctness of the employee witness' testimony inherently improbable and the inconsistencies in the testimony of such witnesses, Partain, Johnson and Minor, the majority opinion erroneously holds their testimony to be unimpeached and uncontradicted (R. 267), and erred in basing decision upon such finding.

6. The Circuit Court, by majority opinion, erred in that the function of the jury was usurped and findings by the Court substituted for their intended verdict.

7. The majority of the Court erred in holding that the evidence was insufficient to support the jury's finding that the collision in question was the proximate result of negligence on the part of respondent's employee on the occasion in question. (R. 267.)

8. The Circuit Court by majority opinion erred in refusing to follow and apply the decisions of this court in Tennant v. Peoria & P. U. Ry. Co., 64 S. Ct. 409, 321 U. S. 29; Lavender v. Kurn, et al., 66 S. Ct. 740, 327 U. S. 615;

Myers v. Reading Co., 67 S. Ct. 1334; Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444; and T. & P. Ry. Co. v. Cox, 145 U. S. 593, 12 S. Ct. 905, at 909, and the majority opinion and judgment are in conflict with such decisions.

9. The Circuit Court on majority opinion erred in misinterpreting and misapplying the decision of this court in Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333, 53 Sup. Ct. 391, 77 L. Ed. 819, and the judgment and majority opinion of the Circuit Court are in conflict with such decision.

10. The Circuit Court on majority opinion erred in misinterpreting and misapplying the decision of the Supreme Court of Texas in International Travelers Association v. Bettis, 35 S. W. (2d) 1040 (R. 268) and the majority opinion and judgment are in conflict with such decision.

11. The Circuit Court on majority opinion erred in holding that the testimony of the three employee witnesses was positive, uncontradicted and unimpeached as to how the collision occurred. (R. 267.)

12. The Circuit Court by majority opinion erred in refusing to follow and apply the decisions of the Supreme Court of Texas in Houston Railway Company v. Runnels, 47 S. W. 971; Houston E. & W. T. R. Co. v. Boone, 105 Tex. 188, 146 S. W. 533; Brock v. Fellman Dry Goods Co., 212 S. W. 635; Burlington. Rock Island R. Co. v. Ellison, 140 Tex. 353, 167 S. W. (2d) 723; Lockley v. Page, 180 S. W. (2d) 616, at 618; Stephens, et al. v. Karr, 33 S. W. (2d) 725;

and the majority opinion and judgment are in conflict with such decisions.

13. The Circuit Court on majority opinion erred in holding that the circumstances sought to be shown by plaintiffs in the trial court, even if all were admitted to have been proven, are consistent with the testimony of the three employee witnesses. (R. 267.)

SUMMARY OF ARGUMENT

1. The Circuit Court by majority opinion and judgment in this case, a common law action arising in Texas, (a) usurped the function of the jury and substituted its own findings for the verdict of the jury in the court below; (b) took the printed record, credited the testimony of the witnesses for defendant, brushed aside the considered verdict of the jury, and in effect, decided the case as if such court were a jury trying the case and weighing the evidence and drawing inferences therefrom for the first time; and such majority opinion and judgment constitute an "undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses and arrive at a conclusion opposite to the one reached by the jury." (From dissenting opinion McCord, Circuit Judge, R. 271.)

2. There being evidence with probative force establishing negligence on the part of the operator of respondent's explosive truck in the course of his employment proximately causing the death of the husband of petitioner, Mrs. Lizzie B. Hood, the trial court properly overruled respondent's

motions for instructed verdict, for a new trial and for a take nothing judgment.

3. The three employee eye witnesses were interested witnesses. Their testimony was inconsistent and uncertain, and contradicted by the proven facts and circumstances. The correctness of their testimony was rendered improbable by the evidence establishing the physical facts surrounding the collision. The jury was authorized to discredit and disregard all parts of their testimony not consistent with the jury findings of negligence and proximate cause against respondent.

4. The majority opinion and judgment of the Circuit Court are in conflict with decisions of this court and of the Supreme Court of the State of Texas.

ARGUMENT

The questions of "jury trial" and of "negligence" are important questions in our system of jurisprudence, and no more important questions are contained in the body of the law. Petitioners have been deprived of a jury trial on the question of negligence by the majority opinion and judgment of the Circuit Court. No questions affect the lives and security of a greater number of our citizens.

Petitioners in the trial court abundantly proved negligence on the part of the truck operator and that such negligence was the proximate cause of the fatal injury and death of the husband of petitioner, Mrs. Lizzie B. Hood. The evidence was substantial and of probative force. This being true, the Circuit Court was without authority to re-

write the verdict of the jury and substitute opposite findings of its own.

The parties in the trial court stipulated that the truck which collided with the automobile of Mr. Hood belonged to Texas Company and was being operated by Texas Company through an agent. (R. 109.)

The evidence showed that the hard surfaced portion of the highway at the scene of the accident was 34 feet wide with a center stripe. (R. 92.) Dr. James testified that he was called and arrived at the scene with the ambulance driver. Mr. Hood was dead and his body was in his automobile on the pavement on his right side of the road. (R. 41.) The undertaker described the condition and position of the body in the car by saying "He was more or less lying back like he had fallen back on the seat, part of the car having been knocked in on his head." (R. 49.) He located the explosive truck as being about 75 steps from the Hood car and in the bar ditch on the truck's wrong side of the road (R. 55), and said that the left side of the coupe was crushed in on Mr. Hood. (R. 55.) He identified the picture of the automobile, Plaintiff's Exhibit No. 1 (R. 204), and testified that the corner post on the left side between the windshield and door was knocked back and crushed the head of Mr. Hood. He removed the post from his head. (R. 56.) He located the debris from the explosive truck as being between the truck and car, both at rest following the collision. (R. 61.)

Frank Jackson, a highway patrolman, called to the scene of the accident, located the Hood car on its right side of the

road, near the center of the road, not over 10 or 12 feet from the point of impact (R. 65), and fixed the point of impact as being near the center of the road and on Mr. Hood's right side of the road (R. 66) within three feet of the center line on the south side (R. 85), being the right side for Mr. Hood and the wrong side for the truck. He fixed the point of impact by "a collection of dirt and grease, greasy dirt, such as falls off from underneath a car when it suddenly collides with something." (R. 72.) He found no tire skid marks on the road (R. 76), but found a hole in the concrete on Mr. Hood's right side of the road. (R. 81.) The hole in his opinion was a small dent made by the Hood car. (R. 82.) "The oil from the crank case of one of the vehicles was on the south side, a big splotch of oil was on the south side" (R. 85), the right side for the car and the wrong side for the truck. His opinion was that the part of the body of the truck that sticks out beyond the cab struck the Hood car near the top on the left side near the steering wheel. (R. 89.) The highway engineer fixed the width of the pavement on each side of the center stripe as being 17 feet. (R. 92.)

Mr. Williams testifying in the trial court fixed the location of the impact by the debris and oil on the pavement as being a good step from the center stripe on Mr. Hood's right side of the road. (R. 94.) Nolan Maynard, the sheriff arriving at the scene of the accident, found Mr. Hood still in the car and located the car as being about a foot from the center line on Mr. Hood's side of the highway. (R. 111, 112.) He observed marks on the south side, Mr. Hood's side, of the center stripe of the pavement. (R. 120.)

Mr. Akard, a deputy sheriff, located the Hood car as being about 18 inches from the center stripe on its side of the road and the truck on its wrong side. (R. 128.) He saw lots of rubbish scattered from the car to the truck at rest. (R. 130.) *One of the occupants of the truck told him it turned end over end.* (R. 131.)

The Justice of the Peace testified that the front bumper of the truck, as large as his arm and of iron and steel, was bent back and against the wheel (R. 135), and located the truck and car at rest. He said the left side of the car was demolished, that the left door was torn off or back and that the windshield frame was bent back toward the driver (R. 137), and saw the debris scattered from the car up to where the truck came to rest. (R. 138.)

Mr. Palmer, a witness called in the trial court by the defendant, located both vehicles at rest, the truck on its extreme wrong side of the road, and said the top of the car and the front arm by the windshield was caved in on Mr. Hood. (R. 145.)

Mr. Johnson, the driver of the explosive truck, admitted that he was travelling uphill at the time of the collision, driving a dual wheel truck weighing about 8,500 pounds. (R. 149.) He saw the lights of the Hood car when it came over the hill (R. 150) and said following the collision it seemed like he was whirling in space, "Just whirling in space seemed to me like, I didn't know anything until I come to myself. I was lying out in the bar ditch. Q. You were thrown out of the cab of your truck? A. Yes, sir. Q. Were the other two individuals riding up in the cab with

you? A. Yes, sir." He further said that he was lying southwest from the truck at rest in the bar ditch on its extreme wrong side of the road, and on the opposite side to the driver's seat. He was the driver. (R. 153.) He stated that the powder and loading poles being carried by him in the truck were dumped out and that he didn't have any way of knowing how many times the truck turned over. (R. 154.) He admitted that the debris was scattered from the Hood car at rest to where his truck came to rest, and couldn't remember whether his truck started turning over at the time of the crash. (R. 156.) The window of the truck on his side was closed. (R. 159.) He said that he was travelling uphill on his right side of the road about 75 or 100 feet from the top of the hill at between 30 and 40 miles per hour at the time of the collision and that immediately before the collision, he whipped his steering wheel to the right. (R. 151.)

If this testimony had been correct, the accident would not have happened. His truck would not have whirled through space end over end and travelled 200 or more feet uphill, coming to rest in the bar ditch on its wrong side of the road.

Mr. Partain, another employee witness occupying the truck, testified that at the time of the collision the right wheels of the truck were off the pavement on its right side of the road. (R. 163.) He was thrown to the right of the truck at rest and after getting on his feet remained at the scene 3 or 4 minutes but did not go to the Hood car. (R. 164.) He said that the truck came to rest 20 or 30 feet from the place of collision on its wrong side of the road (R. 166,

167), and further that the truck bed was between four and five feet wide and that the cab in which the three of them were riding was about 3 feet wide. (R. 169.) Other vague and indefinite testimony given by this witness was:

"Q. Now, Mr. Partain, I would like for you in your own way to tell this jury how that truck got from the north shoulder of that road where you say it was when it struck Mr. Hood's car clear across the road and over in the ditch on the south side. Just tell them how it traveled.

"A. Well,—

"Q. Whether it went through the air or went on the ground or how?

"A. It turned over once, I guess. You know, rolled a little piece. I guess it did.

"Q. Did it roll before it turned over, or did it turn over and then roll?

"A. I don't know.

"Q. Did it slide on its top?

"A. I don't know that.

"Q. Do you know when you left it?

"A. Yes, I know whenever I left it.

"Q. When was that? Was that after you stopped or while it was in motion going through the air?

"A. It turned on its wheels the last time it throwed me out of it.

"Q. It was turning toward Cooper or in the general direction of West, wasn't it?

"A. Yes."

All parties admit that the road was running in the direction of northeast and southwest and if the testimony of this

witness that the truck turned or rolled in the general direction of west was true, it could not have reached its extreme wrong side of the road, as it did. If the truck had been driven on its extreme right hand side of the road, the accident could not have happened.

Mr. Minor, the other employee witness who gave vague and uncertain testimony, and incorrect testimony when considered in view of the admitted and established physical facts, testified that he couldn't say positively how fast the truck was travelling at the time of the accident but *guessed* the speed to be 30 or 35 miles per hour. (R. 173.) He said that the right wheels of the truck driven by Johnson in which he was riding were close to the edge of the pavement. He saw the car come over the hill. He was then asked by counsel for Texas Company on direct examination the plain question:

> "What side of the road were *you travelling on* when *you* first saw him?"

And he answered,

> "Well, it seems *he* made the turn over the hill, that *he* crossed the black line, pulled over."

He then testified on direct examination with reference to his claim that the car pulled across the road into the truck in the following words:

> "Q. On which side, your right or the other side?
>
> "A. Our side, on the left.
>
> "Q. All right.
>
> "A. Then, he pulled back and come on down.
>
> "Q. Yes.

"A. And got about twenty or thirty feet from us. I don't know. Might have been a little further; might not have been that far, pulled direct into us.

"Q. What part of *his car* hit your truck?

"A. Well, I imagine it was something from *about half way back to the out edge of the car.*" (R. 174.)

Then he said the left front of the truck came in contact with the Chevrolet (R. 175), that he didn't know whether or not the bumper was bent at that time but later learned that it was. He didn't know what happened at the time of the collision. He didn't know whether or not the truck turned over. His *guess* was that it did. He didn't know whether or not he was thrown out of the truck, and didn't know how long he stayed at the scene of the accident. (R. 175.) All of this testimony was on direct examination.

On cross examination he stated that he didn't know how many times the truck turned over and didn't remember that it turned over. He didn't know which way he was thrown from the truck. (R. 181.) He said the truck was on its extreme right edge of the hard surface. (R. 182.) He testified as follows:

"Q. Was there any culvert ahead of you, or anything of that kind?

"A. Not going up that hill, no, sir.

"Q. Now, will you please explain to the jury from your memory just how that truck got on up the hill and across the road over in the ditch on the opposite side?

"A. No, I couldn't explain it, because I didn't know anything about it.

"Q. Well, will you please account for it, all you know about it, tell all you know about it getting from that extreme north side over to the south and on up the hill?

"A. No, sir, I couldn't tell you. I couldn't explain it.

"Q. Did it turn over end ways?

"A. I don't know." (R. 184.)

On redirect examination he was asked:

"Q. You just said the truck was out near the edge of the hard surface. Is that right?

"A. Well, the hard surface, what I meant *is the dirt.* Maybe a little gravel mixed with it. I wouldn't say, but call it kind of a hard surface road, you know, put on the edge of the slab." (R. 185.)

Petitioners submit that the testimony of these witnesses is inconsistent and that the correctness thereof is inherently improbable, as well as being vague and uncertain. If by any illogical reasoning, one could from their statements conclude that the collision occurred on the truck's right side of the road, then the inevitable conclusion must follow that the truck at the time of the collision was out of control and travelling at such an excessive rate of speed as to hurl the light car back to its proper and right side of the road, then roll end over end uphill for more than 234 feet, 34 feet across the road, and more than 200 feet up the road, finally stopping on its extreme wrong side in the bar ditch, *as it did*—all without dislodging the dead body of the driver, sitting upright and leaning backward, under the steering wheel.

The testimony in this case taken as a whole is conflicting, and the testimony of the surviving eye witnesses when considered separately or collectively conflicts with the established physical facts and circumstances surrounding the accident. Therefore the case was properly submitted to a jury and the jury having returned their verdict for petitioners, judgment was properly entered thereon in the trial court.

Obviously, the jury in arriving at their verdict, disregarded and disbelieved the testimony of the eye witnesses to the effect that the Hood car cut across the road into the Texas Company truck, and this they had an absolute and perfect right to do, either on account of, (a) the inconsistencies in their statements, (b) the fact that their statements were inconsistent with the physical facts, (c) the fact that their statements were vague and uncertain, or (d) if they believed their statements to be untrue from their manner of testifying, prejudice exhibited, interest in the litigation, or other things indicating their testimony not to be reliable. Courts recognize that the weight of credible evidence may differ from that which appears from the record of the trial.

Petitioners believe that the set of facts in this case falls squarely within the rules announced by this court in *Tennant v. Peoria & P. U. Ry. Co., 64 Sup. Ct. 409, 321 U. S. 29; Lavender v. Kurn, et al., 66 Sup. Ct. 740, 327 U. S. 645; Myers v. Reading Co., 67 Sup. Ct. 1334;* and, *Tiller v. Atlantic Coastline Ry. Co., 318 U. S. 54, 63 Sup. Ct. 444;* and *T. & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905*

at 909, and by the Supreme Court of Texas in *Houston Railway Company v. Runnels, 47 S. W. 971; Houston E. & W. T. R. Co. v. Boone, 105 Tex. 188, 146 S. W. 533; Bock v. Fellman Dry Goods Co., 212 S. W. 635; Stephens, et al. v. Karr, 33 S. W. (2d) 725; Burlington, Rock Island Ry. Co. v. Ellison, 140 Tex. 353, 167 S. W. (2d) 723*, and *Lockley v. Page, 180 S. W. (2d) 616, at 618.*

In *Tennant v. Peoria & P. U. Railway Co., 64 Sup. Ct. Reporter 409 at 412*, with reference to proving that respondent was negligent and that such negligence was the proximate cause in whole or in part, it was held that after petitioner presented probative facts from which the negligence and causal relation could reasonably be inferred,

> "No court is then justified in substituting its conclusions for those of the twelve jurors"

Further,

> "It is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citations omitted.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different infer-

ences or conclusions or because judges feel that other results are more reasonable. * * * Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."

In *Lavender v. Kurn, 66 Sup. Ct. 740 at 744,* with reference to evidence tending to show that it was physically and mathematically impossible for the jury to have been sustained as claimed by the plaintiffs, this court held:

"But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citations omitted.)

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

These decisions were followed and approved in *Myers v. Reading Co., 67 Sup. Ct. Reporter 1334 at 1339*, and are in strict accord with the decisions in *Tiller v. Atlantic Coastline Ry. Co.*, and *T. & P. Railway Co. v. Cox, supra.*

The Supreme Court of Texas in the case of *Houston Railway Company v. Runnels, 47 S. W. 971 at 972*, held:

> "It is the province of the jury to pass upon the credibility of the witnesses, and they may disregard the testimony of a witness who has neither been impeached nor contradicted, if they believe his statements to be untrue from his manner of testifying, prejudice exhibited towards the opposite party, or his interest in the result of the litigation, or other things indicating that the evidence is not reliable. The law has not, however, prescribed as tests of credibility the demeanor of a witness, his prejudice, etc., but courts have refused to set aside verdicts rendered upon conflicting testimony, when the apparent weight was against the finding of the jury, and in support of their rulings have generally assigned the reason that the witnesses were before the jury, who had the opportunity to see their manner of testifying, to observe whether they disclosed prejudice in the case, and other matters which would indicate the want of truth in their statement, either from intentional misstatement or from other causes, and might have discredited some of them, making the weight of the credible evidence to differ from that which appears of record."

The Supreme Court of Texas in *Houston E. & W. T. R. Co. v. Boone, 146 S. W. 533 at 535*, held that negligence like any other fact need not be shown by direct and positive evidence but may be inferred from other facts which are proved, the inference being fairly inferable from the evidence, and that such principle permits the admission of

circumstantial evidence to contradict *positive* and *direct* testimony given by eye witnesses. The court further held that it was not incumbent on one proving an accident which implies negligence to show the particular negligence when from the circumstances it is not in his power to do so. The decision followed a former opinion of the court to the effect that if there is any evidence which tends to prove negligence, an issue of fact is made to be decided by the jury, and of which the court had no jurisdiction.

In *Bock v. Fellman Dry Goods Company, 212 S. W. 635 at 636, 637*, the Supreme Court of Texas by adoption and approval of a Commission opinion, consistent with other decisions herein mentioned, held that the cause of an accident may be inferred from circumstances and both negligence and proximate cause established by circumstantial evidence. It was also held that a basis for the inference of negligence and proximate cause having been established by circumstantial evidence, the plaintiff was not required to exclude the probability that the accident might have occurred in some other way.

To the same effect is the opinion of the Supreme Court of Texas, 1943, in *Burlington Rock Island Ry. Co. v. Ellison, 167 S. W. (2d) 723 at 726*, wherein the court approved and quoted the holding in the *Bock case* just cited.

Again, the Supreme Court of Texas in *Lockley v. Page, 180 S. W. (2d) 616 at 618*, held that it was exclusively within the province of the jury to decide what credence should be given to the testimony and that they were the judges not only of the facts proved but of the inferences

to be drawn therefrom, provided only, that such inferences were not unreasonable.

The Supreme Court of Texas in *Stephens v. Karr, 33 S. W. (2d) 725 at 728, 729*, held that it is error to instruct a verdict when the evidence raises any material issue and that in determining defendant's right to a directed verdict, the evidence must be considered in the light most favorable to plaintiff. The court said:

> "If there is any conflicting evidence, either direct or circumstantial, in the record of a probative nature, the case is for the jury."

The majority opinion and judgment of the Circuit Court misapplies and misinterprets the decision of this court in *Pennsylvania R. R. Co. v. Chamberlain 53 Sup. Ct. 391*, and the decision of the Supreme Court of Texas in *International Travelers Association v. Bettis, 35 S. W. (2d) 1040*. Such cases do not sustain the judgment reversing the trial court. They are not controlling and the majority opinion in this case is in conflict with reasoning contained in such decisions. In *Pennsylvania R. R. Co. v. Chamberlain* it is said:

> "It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side."

This rule is not rejected by any holding in the opinion in that case but is followed by each and every holding therein when such holdings are considered conversely.

The case of *International Travelers Association v. Bettis, 35 S. W. (2d) 1040*, is an action upon an accident policy interpreted by the Supreme Court of Texas as requiring a claimant to expressly prove that the injury complained of did not come within one of the exceptions set out in the policy. The sole holding of importance is that under the particular facts set out in the record in that case, there was no proof as to how the injury was inflicted on the insured after incompetent and inadmissible evidence had been excluded and that the burden was on the insured to show that his injury was not within one of the exceptions in the policy.

Petitioners respectfully submit that there is evidence of probative force establishing negligence on the part of the truck operator and that such negligence was the proximate cause of Mr. Hood's injury and death, whereby a basis for the jury verdict existed and that the Honorable Circuit Court of Appeals was without authority to rewrite the verdict.

WHEREFORE, petitioners pray, as in their foregoing petition, that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record and proceedings of said Circuit Court in the case on its docket numbered 11,792, entitled "*The Texas Company, appellant, v. Lizzie B. Hood, et al., appellees*," to the end that said cause may be reviewed and determined by this court as provided by the Statutes of

the United States, the judgment of the Circuit Court reversed, and the judgment of the District Court affirmed; and they pray for such other and further relief as this court may deem proper.

Respectfully submitted,

W. F. MOORE,
Paris, Texas,
Attorney for Petitioners.

In the

Supreme Court of the United

OCTOBER TERM, 19[illegible]

MRS. LIZZIE B. HOOD, et al.,

Petitioners,

v.

THE TEXAS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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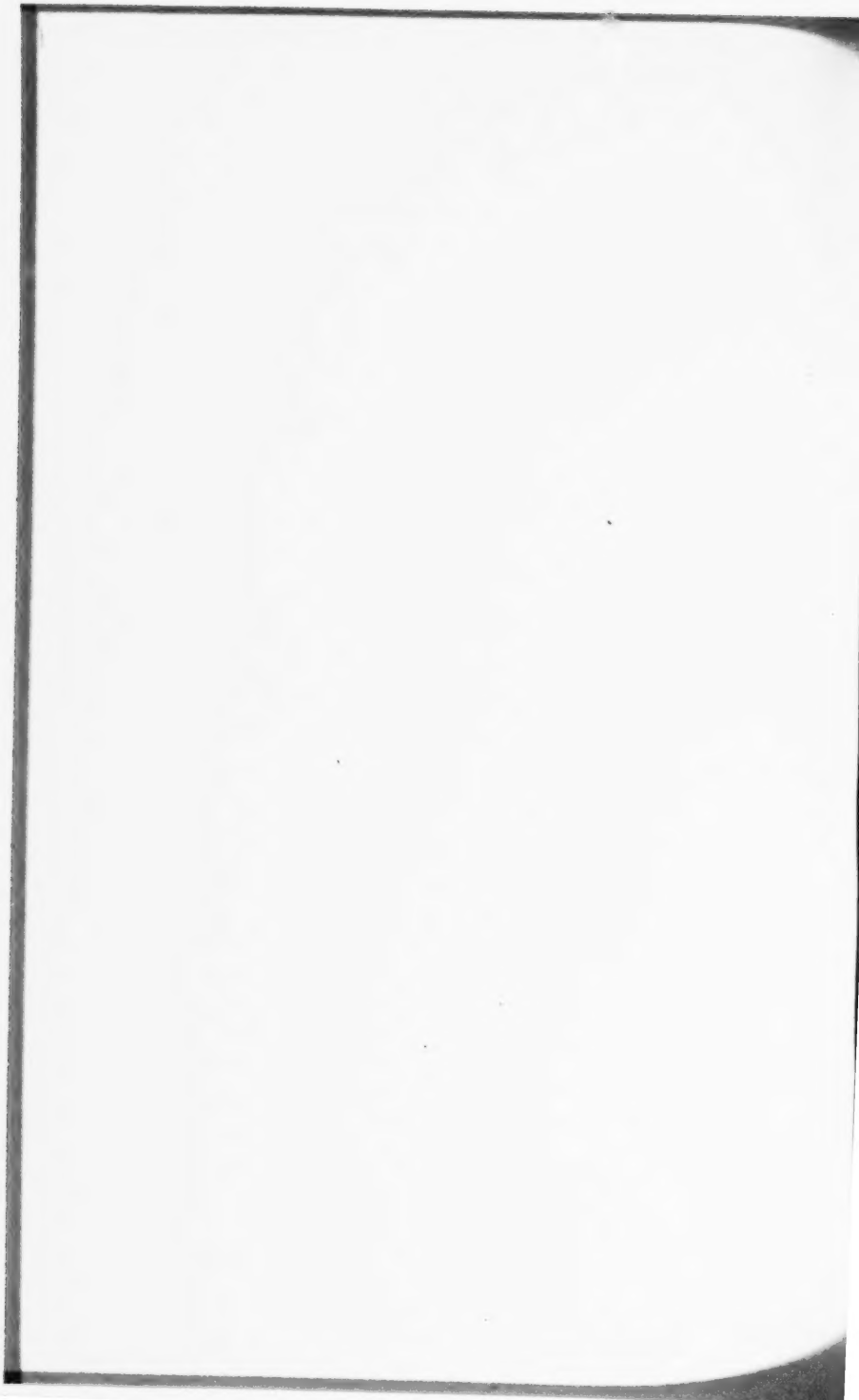
WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Harwood [illegible]



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No. 300

In the

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OCTOBER TERM, 1947

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v.

THE TEXAS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
STATEMENT OF CASE

Respondent here adopts the statement of this case as given by the Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion. (R. 262-264.)

II.
SUMMARY OF THE ARGUMENT

POINT ONE

The petition for writ of certiorari presents no valid reason based upon the record in this case meriting the granting of this writ because (a) the local law of Texas is con-

trolling in this case and there is no federal law or federal question involved in its determination; (b) this case, being governed by the applicable law of Texas, was decided by the Honorable Circuit Court of Appeals for the Fifth Circuit in accordance therewith in the accepted and usual course of judicial proceedings.

(a) This suit is purely a common law action for negligence. The Federal jurisdiction of this cause exists solely on the basis of diversity of citizenship of the parties and said suit does not involve any Federal question or law. The sole question at issue is whether or not petitioners made a submissible case for the jury, which question the Honorable Circuit Court of Appeals for the Fifth Circuit rightly answered in the negative basing its decision on the well settled law of Texas and which law controls the decision in this case.

(b) Since this case is governed by the applicable law of Texas the Honorable Circuit Court of Appeals for the Fifth Circuit correctly applied well settled state law in reaching its decision that petitioners had not presented a submissible case for the jury. Petitioners presented no direct evidence as to any negligence on the part of respondent. They relied solely upon the delineation of witnesses as to physical findings observed after the collision. These observations including a description of the damage to both vehicles as being on the respective left side of each, the location of the vehicles after the accident as being some sixty to two hundred feet apart, a description of debris scattered along the center line of the highway, an oil spot and a dent in the

pavement which dent the overwhelming testimony shows to have been on respondent's side of the road. From these stated observations alone it is impossible to arrive at any intelligent or reasonable conclusion as to the point of accident on the highway such observations being equally consistent with conflicting hypotheses, leaving the jury to the purest conjecture and surmise and requiring the piling of presumption on presumption in arriving at any conclusion at all. This is not permissible. Moreover respondent introduced direct, disinterested, positive, unequivocal and uncontradicted eye witness testimony affirmatively showing this accident occurred on *respondent's side of the road* and such evidence destroyed any conflicting inferences and was conclusive of such matter under the clearly established law in Texas which law this Honroable Court has likewise approved.

III.
ARGUMENT

POINT ONE—(Restated)

The petition for writ of certiorari presents no valid reason based upon the record in this case meriting the granting of this writ because (a) the local law of Texas is controlling in this case and there is no federal law or federal question involved in its determination; (b) this case, being governed by the applicable law of Texas, was decided by the Honorable Circuit Court of Appeals for the Fifth Circuit in accordance therewith in the accepted and usual course of judicial proceedings.

DISCUSSION

Petitioners' asserted reasons for the allowance of this writ of certiorari appear on Pages 10 and 11 of their petition.

It is of course recognized that the granting of this writ rests within the sound judicial discretion of this Honorable Court but certainly this record does not indicate any basis for the *character of reasons* that this Honorable Court has stated it will consider in exercising its discretion. Supreme Court Rule 38 Sub-paragraph 5 (a) through (c).

THE LOCAL LAW OF TEXAS IS CONTROLLING IN THIS CASE AND THERE IS NO FEDERAL LAW OR FEDERAL QUESTION INVOLVED IN ITS DETERMINATION.

This suit is simply a common law action for negligence allegedly causing the death of petitioners' decedent.

The jurisdiction of the Federal Court in this case is based *solely* upon diversity of citizenship. (R. 16.) This Honorable Court has definitely held that in cases in which jurisdiction depends upon diversity of citizenship the substantive rights of the parties are to be determined by the local applicable law. *Erie Ry. v. Tompkins, 304 U. S. 64; 58 Sup. Crt. 817; 82 L. Ed. 1188.* Whether or not a plaintiff has made a submissible case for the jury is, therefore, determined by the law of the state where the suit is brought. See *Stoner v. N. Y. Life Ins. Co., 311 U. S. 464; 61 Sup. Crt. 336; 85 L. Ed. 284.*

Since the determinative question in the instant case *is* simply whether or not the petitioners made a submissible case for the jury, its decision falls within the realm of Texas law. The Honorable Circuit Court of Appeals for the Fifth Circuit, applying the well settled law of Texas, rightly held petitioners had not so done. (R. 262.)

Tennant v. Peoria & P. U. Ry. Co., 64 S. Ct. 408, 321 U. S. 29; Lavender v. Kurn, et al., 66 S. Ct. 740, 327 U. S. 645; Myers v. Reading Co., 67 S. Ct. 1334; Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444; Highfill v. Louisville & Nashville R. Co. 154 Fed. (2d) 874; Griswold v. Gardner, 155 Fed. (2d) 333 cited by petitioners, are cases involving the Federal Employers' Liability Act and are not applicable to this case. As stated by this Honorable Court in *Ellis v. U. P. Ry. Co., 67 Sup. Ct. 598, 91 L. Ed. 433 at page 435*, in discussing the standards of liability under this act "whether these standards are satisfied is a Federal question, the rights created being Federal rights." The early case of *T. & P. Ry. Co. v. Cox, 145 U. S. 594; 12 Sup. Crt. 905* cited by petitioners does not assist them and certainly presents no conflict with the instant case. This Honorable Court in such case held that jurisdiction of the Federal Court existed because the suit was one "arising under the constitution and laws of the United States." The Supreme Court in this decision specifically stated that the Circuit Court applied well settled principles of law in disposing of the case without describing such principles. A contention was made that the defendant should have been granted an instructed verdict and this Honorable Court properly stated that "the bill of exceptions does not purport to contain all

the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

The case of *Melville v. State of Maryland, et al., Circuit Court of Appeals Fourth Circuit, 155 Fed. (2d) 440* cited by petitioners clearly bears out the stated rule that in ascertaining the rights of the parties in this case the law of Texas controls. This case was also a death case and involved a collision between two trucks. The occupants were killed and there were no eye witnesses who testified (parenthetically we may add this is one of the facts distinguishing this case from the *Hood case)*. The *Melville case* was removed to a Federal Court in Maryland and upon appeal to the Circuit Court, Circuit Judge Dobie said:

> "It is conceded that we must here follow the law of Maryland."

THIS CASE, BEING GOVERNED BY THE APPLICABLE LAW OF TEXAS, WAS DECIDED BY THE HONORABLE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN ACCORDANCE THEREWITH IN THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In keeping with settled principles of law in Texas as enunciated by the Honorable Circuit Court of Appeals for the Fifth Circuit in this case, petitioners simply failed to introduce any testimony of probative nature that warranted the submission of the case to the jury.

It is well settled law in Texas that the mere happening of an accident is no evidence at all of negligence. *Phillips*

v. Citizens National Bank, Tex. Com. App., 15 S. W. (2d) 550; Rankin v. Nash-Texas Company, 129 Tex. 396; 105 S. W. (2d) 195; Davis v. Castile (Com. App.), 257 S. W. 870. Petitioners' evidence did not go beyond mere proof of an accident.

Although petitioners alleged some five acts of negligence on the part of respondent (R. 2-9) no probative evidence was introduced to support any of them.

Testimony was introduced relative to the *position of the two vehicles* after the accident and as the Circuit Court concisely stated "the position of the truck of the defendant after the accident was variously placed at from 60 to 200 feet or more from the point of impact, from which plaintiff's counsel also insists that the inference should be drawn that the truck was traveling at an excessive rate of speed." (R. 263.)

The court then justly held that "the circumstance that the truck may have been 200 feet or more from the point of collision is without any significance in view of the undisputed fact that upon the collision the driver was thrown out of the truck and it was, therefore, without a driver to guide it or bring it to a halt, no imputation of excessive speed can be drawn from this circumstance in the light of undisputed testimony." (R. 264.)

Petitioners introduced no evidence at all as to the speed of the truck belonging to respondent. The occupants of the truck, Stanley Johnson, H. C. Partain and W. L. Minor, placed the speed of the truck at between 30 and 40 miles per hour. (R. 148, 162 and 173.)

In *Schumacher et al. v. MoPac (Tex. C. C. A.), 116 S. W. (2d) 1136* the defendant's vehicle came to a stop on the wrong side of the highway and 132 feet from the place of collision. The court said that such facts were not sufficient to warrant a jury finding of negligence against either party or of a finding of proximate cause.

Respondent submits that certainly speed could not as a matter of law have been a proximate cause of the collision if both vehicles had been traveling on their respective sides.

The testimony as to the damage to the two vehicles showed it to be confined to the respective left side of each vehicle. Petitioners' Witness Frank Jackson testified to damage on the left side of the automobile stating that the entire left side was torn out. (R. 69.) With respect to the damage to the truck Jackson testified that the *left side* of the truck was damaged. (R. 69.) The bed of the truck stuck out some eight or ten inches beyond the cab (R. 70) and there were marks on the left side of the truck. (R. 70.) It was his opinion that the part of the cab that stuck out, struck the car near the top on the left side up near the steering wheel. (R. 89.)

Does the given fact of damages to both vehicles being confined to their respective left sides present any probative fact as to what *point on the highway* they came together? The question seems to answer itself. Respondent submits it to be axiomatic that the damages occasioned the two vehicles could have just as surely happened on the north side of the highway (respondent's side) as on the south side (petitioners' side). To allow the jury to determine which

side of the road the accident happened on from the damages resulting to the two vehicles is to permit them to indulge in pure speculation and conjecture. This is not permissible. *Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059; Stokes v. Burlington Rock Island R. Co. (Ct. Civ. App.), 165 S. W. (2d) 229. (Error refused.)*

There was testimony relative to a dent in the pavement, an oil spot and other debris. Petitioners' Witness Jackson testified that there was grease and dirt "right about, very near the center stripe. The big amount of the dirt and grease and stuff that dropped off, what I judged dropped off the car, was right near the center stripe. *Possibly some of it might have been just a little over*, but most of it was on the south side of the highway the way the road is running there." (R. 66.) (Italics ours.) He further stated debris seemed to be scattered promiscuously right down about the center line, "possibly some on either side." (R. 73.)

In regard to an alleged oil spot, petitioners' Witness Jackson on cross examination testified:

> "Q. In other words, that is the point of the contact of the oil, the main body that was dumped out, from six to twelve inches. Is that right?
>
> "A. I would say within six inches of the center line.
>
> "Q. Now, as a matter of fact, the wheels of the automobile could have been across the center line and that oil been just exactly where you say it was, couldn't it?
>
> "A. You want me to say whether it could have been that way or not?
>
> "Q. Yes.
>
> "A. It is possible." (R. 86.)

Respondent's witnesses Sheriff Nolan Maynard (R. 113-114), Deputy Sheriff O. C. Akard (R. 127), Justice of the Peace W. H. Bell (R. 133) and neighboring farmer Bob Palmer (R. 140) all testified at the designated portions of the record that there was a hole in the pavement on the respondent's side of the center line of the highway. Petitioners' Witness Jackson testified to finding a hole on the south side of the pavement or petitioners' decedent's side of the road. (R. 66 and 81.) He did not undertake to tell *where* it was located on the south side. When asked "do you have an opinion as to what part of the left side of the Hood car made that hole" he answered "no I do not." (R. 83.)

Thus we have the situation of debris existing on both sides of the center of the road. Witness Jackson eliminates the oil spot from consideration when he testified as stated above that it could have been where he says he found it and the wheels of the petitioners' decedent's car have been across the center stripe. This testimony is further rendered without probative value whatsoever when it is considered that no testimony was offered with respect to the width of petitioners' decedent's car, whether there was anything to indicate whether the car had been knocked back at the time it dumped its oil or whether on the other hand it dumped the oil the instant it came in contact with the truck, what side of the oil pan it spilled out of or any number of like facts which would be necessary to render such testimony worthy of consideration in determining whether it could be told from the location of the oil spot where the Chevrolet was traveling at the time of the collision. The dent in the pavement most assuredly does not make a case for peti-

tioners because from their testimony it is impossible to tell where the dent testified to by Jackson was actually located. In this connection it is worthy of consideration that Officer Akard testified that petitioners' Witness Jackson talked with him the morning following the accident and admitted that the hole or dent was on the north side (respondent's side) of the slab. (R. 129.) Thus, as concisely stated by the Circuit Court of Appeals for the Fifth Circuit in this instant case "to sustain the plaintiffs' contention it would be necessary to presume: 1. That the dirt and oil came from decedent's automobile; 2. That decedent's automobile was on its side of the center line of the highway when the dirt and oil were knocked from it; 3. That the decedent's car did not turn into the truck; 4. That the driver of defendant's truck was negligent; 5. That the defendant's negligence was the proximate cause of the injury; * * * such pyramiding of inferences is not permissible under the laws of Texas." (R. 266.) The authorities in Texas are many to the effect that a plaintiff is not entitled to have a case submitted to the jury where in order to establish liability on the part of the defendant it becomes necessary that inferences be piled upon other inferences. *Wells v. Tex. Pac. Coal & Oil Co. (Com. App.), 164 S. W. (2d) 660; Community Natural Gas Co. v. Henley (Com. App.), 24 S. W. (2d) 10; Garrett v. Hunt (Com. App.), 283 S. W. 489.* It is equally well established that where evidence tends to support two conflicting hypotheses it supports neither; *Kansas City Sou. Ry. Co. v. Carter (C. C. A. of Texas), 166 S. W. 115 at p. 121 (Par. 8-10); Bonner v. Texas Co. (5th Circuit), 89 Fed (2d) 291 at p. 294* (ap-

plying this settled law of Texas); and that the verdict of a jury can not be reached from conjecture and guess work. *International Travellers Ass'n v. Bettis (Sup. Ct. of Texas), 35 S. W. (2d) 1040; Missouri Pacific R. R. Co. v. Porter (Sup. Ct. Tex.), 11 S. W. 324; Wells v. Tex. & Pac. Coal & Oil (Com. App.), 164 S. W. (2d) 660; Doggett v. Peek (Fifth Circuit), 116 Fed. (2d) 273 (applying this law of Texas.)*

There is yet another compelling reason why petitioners did not make a submissible case for the jury. Such reason is that any inference that might have otherwise been drawn from the circumstances presented was destroyed by the direct, clear, disinterested and unimpeached testimony from the three survivors of this collision. Witnesses Stanley Johnson, H. C. Partain and W. L. Minor gave the only direct and eye witness testimony as to the action of the two vehicles involved *at and immediately prior* to this unfortunate accident. *Stanley Johnson* testified that he was the driver of the respondent's truck involved in the accident; that the accident occurred between six and seven p. m.; all lights including side lights, clearance lights and front lights on the truck were burning (R. 146); as he approached the scene of the accident he was driving between thirty and forty miles per hour (R. 148); he was traveling on his side or the north side of the center marker (R. 148) he saw the Hood car for the first time when it topped the hill in question (R. 150) the car drove up close to him and then whipped into him. (R. 150.) The car was traveling near the center line as it approached the truck (R. 151) when about twenty feet from the truck the car just

whipped into him. (R. 151.) The car was going at a greater speed than he was. (R. 151.) No part of the truck was on or even with the center line. (R. 151.) He did not know what happened after the car and truck came together and did not know anything until he came to himself after being thrown from the cab of the truck.

Witness H. C. Partain testified that he had not worked for respondent since November 28, 1944, the date of the accident. (R. 160.) That he was riding in the front seat of the truck along with Johnson and W. L. Minor. (R. 161.) The truck was traveling about thirty-five miles per hour as they drove toward Cooper. (R. 162.) They were traveling on the north side of the highway and no part of the truck was over the center line immediately before the accident. (R. 162.) The Hood car was from seventy-five to a hundred yards from them when he first saw it. (R. 162.) When he first saw the Hood car it was over the center line and then it pulled back on its own side of the road. When the Hood car got nearer to them its driver pulled over the line and into the truck. (R. 162.) When the Hood car was about twenty feet from the truck it whipped into them. (R. 163.) *Witness W. L. Minor* testified he had not been working for respondent for six or seven months. (R. 162.) He was riding on the right side of the truck seat. (R. 172.) The truck was traveling at about thirty or thirty-five miles per hour as it aproached the place of the accident. (R. 173.) The truck was driving on the right side of the road with no part of it over the center line. (R. 174.) He saw the Hood car for the first time as it topped the hill. (R. 174.) After the Hood car came over the hill it came

over the center marker onto their side of the road and then pulled back to its own side (R. 174) and when about twenty or thirty feet away pulled into respondent's truck. (R. 174.) He did not know what happened after that for he was knocked out. The car was traveling faster than the truck. (R. 176.)

The above testimony is clear, positive and unequivocal as to on whose side of the road this accident happened, the main point at issue. It reveals clearly, positively and unequivocally that the accident *in fact* happened on respondent's side of the road. Such evidence stands *uncontradicted.* Most assuredly the physical facts in and of themselves relied upon by petitioners to establish their case do not contradict this eye witness testimony offered by respondent. It is submitted that under the settled law of Texas as held by the Honorable Circuit Court of Appeals in this case that such presumptions or inferences as relied upon by petitioners cannot stand in the face of the clear, positive, uncontradicted and unequivocal testimony elicited from three surviving eye witnesses to this accident directly revealing the real fact as to the place of collision on the highway, namely, respondent's side of the roadway. *Empire Gas & Fuel v. Muegge (Sup. Crt.), 143 S. W. (2d) 763; Simonds v. Stanolind Oil & Gas Co. (Com. App.), 136 S. W. (2d) 207; Texas Pacific Coal & Oil Co. v. Wells, 151 S. W. (2d) 927 at p. 931 (C. C. A. of Texas), Aff. 164 S. W. (2d) 660; Paris & M. P. Ry. Co. v. Russell (Crt. Civ. App.), 104 S. W. (2d) 650; Carlisle v. City of Waco (Crt. Civ. App.), 56 S. W. (2d) 208; Huntley v. Psimenos (Crt. Civ. App.), 67 S. W. (2d) 350; Wichita Valley Ry. Co. v.*

Fite (Crt. Civ. App.), 78 S. W. (2d) 714; Caliandro v. Texas & P. Ry. Co. (Crt. Civ. App.), 103 S. W. (2d) 439.

In the recent case of *Fordham v. Butane Gas & Equipment Co. (Civ. App. of Texas), 198 S. W. (2d) 607 (writ of error refused, no reversible error)*, the basic question for decision was whether or not there was any evidence in the record to warrant the submission of any issue of fact to the jury. Plaintiff was seeking to show that escaping gas caused the fire in question. The court held that there was no proof sufficient to go to the jury and stated that:

> "Had it been shown by circumstances, or had the evidence warranted presumption, that the fire was or could have been caused by escaping Butane gas, the positive evidence that the Butane gas was cut off at the source at and during the time of the fire, precluded the indulgence of the presumption that gas was escaping, or the overlying presumption that escaping gas caused the fire."

In *Bibby v. Bibby (Texas Civ. App.), 114 S. W. (2d) 284 (writ of error dismissed)*, there was involved the questions of the purpose of and acceptance of a deed. The Bibbys positively testified regarding these matters. The court states:

> "This direct and positive testimony of the three Bibbys is strongly corroborated by various cogent facts and circumstances shown by the evidence.
>
> "It is true the Bibbys were interested witnesses, but under the circumstances the jury could not rightfully arbitrarily reject their testimony in favor of a mere presumption."

Moreover the testimony of eye witnesses Johnson, Partain and Minor to the effect that this accident happened

on respondent's side of the road, or the north side thereof when Mr. Hood suddenly veered into respondent's truck being direct in nature, positive, unequivocal, and uncontradicted by any testimony that could be dignified by the word "evidence," is therefore binding upon the court and jury and must be given conclusive effect. Particularly is this rule true of evidence coming from disinterested witnesses. *Grand Fraternity v. Melton (Sup. Ct. of Texas), 117 S. W. 788; Sterling National Bank & Trust Co. v. Ellis (Civil Appeals of Texas), 75 S. W. (2d) 716, error dismissed,* and cases therein cited. The fact that Witnesses Johnson, Partain and Minor were employees of respondent at the time of the accident, and in the case of Partain and Minor, former employees at the time of this trial, does not make them "interested witnesses." *Pyle v. Phillips, 164 S. W. (2d) 569 (Civil Appeals of Texas); Western Union Telegraph Co. v. Gardner, 278 S. W. 278 (Civil Appeals of Texas), error dismissed.* In this last cited case the court pointed out that:

> "Appellant further complains because the court gave peremptory instructions in a case established by interested witnesses. We cannot allow this contention, for the reason that the witness Kalb is not shown to have been a member of the corporation of Weatherford Crump & Co., but only an employee, and, as far as we know, the rule contended for has never been applied to the evidence of a mere employee of an interested party. This assignment of error is overruled."

However, the above rule of conclusive effect applies as well to clear, positive, direct, unequivocal and uncontra-

dicted testimony even though it does come from an interested witness. *Chesapeake & Ohio Railway Co. v. Martin, 283 U. S. 209, 75 L. Ed. 983, at pages 988-990; Trinity Gravel Co. v. Cranke (Comm. of Appeals of Texas), 282 S. W. 798, 801, par. 5; Thomas & Co. v. Hawthorne (Tex. Civ. App.), 245 S. W. 966, 972, et seq (writ refused); Dunlap v. Wright (Tex. Civ. App.), 280 S. W. 276, 279,* and authorities there cited; *Still v. Stevens (Tex. Civ. App.), 13 S. W. (2d) 956, error dismissed.* This rule announced in the above authorities is, of course, further strengthened when such testimony is, as in this case, affirmatively and directly corroborated by other facts and circumstances elicited from other sources. We refer here particularly to the testimony of Officers Maynard (R. 112-124) and Akard (R. 126-131) Justice of the Peace Bell (R. 132-139), and Bob Palmer (R. 139-146), delineating the physical facts appearing at the scene of the accident, and which testimony directly confirms and corroborates Witnesses Johnson, Partain and Minor. *Simonds v. Stanolind Oil & Gas Co. (Com. of App.), 136 S. W. (2d) 207; Gulf C. & S. F. Ry. v. Leatherbury (Tex. Civ. App.), 259 S. W. 598, at page 604, par. 5, writ of error dismissed; Bibby v. Bibby (Tex. Civ. App.), 114 S. W. (2d) 284, writ of error dismissed.*

The above statement of the law in Texas is likewise in keeping with that enunciated by this Honorable Court in *Penna. Ry. v. Chamberlain, 288 U. S. 233; 77 L. Ed. 819.* In view of the careful and comprehensive statement of the principles of law cited therein which corresponds to the

substantive law of Texas on the points discussed, respondent presents the following excerpts by way of emphasis:

> "This is an action brought by respondent against petitioner to recover for the death of a brakeman, alleged to have been caused by petitioner's negligence.
>
> * * * * *
>
> "The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by deceased. Three employees, riding the nine-car string, testified positively that no such collision occurred.
>
> * * * * *
>
> "There is no direct evidence that in fact the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing. At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it. We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.
>
> * * * * *
>
> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise

uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples.

* * * * *

"The fact that these witnesses were employees of the petitioner, under the circumstances here disclosed, does not impair this conclusion. Chesapeake &. O R. Co. v. Martin, 283 U. S. 209, 216-220, 75 L. Ed. 983, 987-989, 51 S. Ct. 453."

Petitioners in their brief make a general charge of inconsistencies in the testimony of the three witnesses above referred to of such nature as to render their testimony improbable. Petitioners assert the testimony of the above witnesses is vague as to what happened *after* the collision only, but it is respectfully pointed out that we are concerned here with events transpiring prior to and immediately at the time of impact. No vagueness exists as to this testimony. As a practical matter the asserted vague testimony as to what happened immediately after the collision should lend credence to such witness' testimony wherein they delineate the facts immediately prior to and at the time of the accident when they were in full possession of all their physical and mental faculties.

Petitioner makes the assertion that the driver and occupants of respondent's truck testified that they were traveling at the time of the accident upon their extreme right side of the highway in question (Petition for Writ of Certiorari, p. 4) and hence the accident could not have happened as testified to. Respondent respectfully submits that

these witnesses did not testify that they were on the "extreme right side of the road." Petitioners' witness Stephenson did not profess to know where the accident occurred (R. 92) but stated generally that the highway had ten feet of *flat concrete surface* on each side of the center line and six feet attached to the flat concrete surface had been topped suitable for traffic. (R. 92.) Witness Johnson testified:

> "Q. Was any part of the truck on or even with that center line at the time he hit you?
>
> "A. No, sir.
>
> "Q. Which side was it on?
>
> "A. It was on the north side." (R. 151.)

Witness Partain placed the truck on its own right side of the highway (R. 162) with the *right wheels* of the truck being on the asphalt topping which immediately joined the concrete slab. (R. 162.)

Witness Minor testified that the right-hand wheels of the truck were *close* to the edge of the *pavement*. (R. 174.) On cross examination he was asked this question:

> "Q. Did I understand your statement to be that that truck at the time it collided with the car of Mr. Hood was completely off of the concrete part of the road and over on the shoulder on its right-hand side?
>
> "A. No, sir.
>
> "Q. Where was it, please, sir?
>
> "A. Well, we were on our, on the right side.
>
> "Q. Where were you with reference to the outside edge?

"A. We was pretty close to the right side edge, yes, sir.

"Q. Pretty close to the outside edge?

"A. Yes, sir.

"Q. According to the testimony, there is a six-foot shoulder that is paved adjacent to the concrete *slab*. What part of your truck was on that shoulder, if any at all?

"MR. ARMSTRONG: We object to counsel stating that that is the testimony. That is not the testimony so far as this particular spot is concerned.

"Q. I will stand corrected if it is not.

"THE COURT: You say your truck, right side of it was close to the edge of the right-hand side of the *slab*. (Italics ours.)

"A. Yes, sir, the right.

"Q. Is that the edge of the hard surface you are talking about?

"A. Yes, sir."

Obviously the witness was referring to the *concrete slab*. On redirect examination he was asked the question:

"Q. Was there any part of the truck off of the concrete slab?

"A. Well, I just wouldn't say."

Certainly the opinion in this case rendered by the Honorable Circuit Court of Appeals for the Fifth Circuit is in keeping with the accepted law of this state. A mere reading of the Texas cases cited by petitioner (Petition for Writ of Certiorari, p. 10) as being in conflict with the opinion delivered in this case reveal that in fact no conflict exists.

Houston Ry. Co. v. Runnels, 47 S. W. 971 follows the unquestioned rule that where a fact issue is made by the evidence it must be submitted to the jury. The court found:

> "There was, between the plaintiff and two of the defendant's employees who testified, as positive a conflict as can be produced by opposing affirmative and negative statements." (p. 972.)

The sufficiency of evidence was not even in question in this suit. *Houston E. & W. T. R. Co. v. Boone, 105 Tex. 188, 146 S. W. 533,* recognizes the principles contended for in the instant case in approving the statement that "a presumption of negligence cannot be based on mere theories or *by simple deduction from other presumptions* * * *." (Italics ours.) The quotation from Thompson's Commentaries on the law of negligence found in this case relative to an accident which implies negligence would apply of course to a res ipsa loquitur action. Such is not the nature, however, of the instant suit. *In the case at bar* there is no evidence, substantial or otherwise—that contradicts the direct evidence introduced. *Bock v. Fellman Dry Goods Co., 212 S. W. 635* recognized that "The evidence must present something more than mere conjecture or surmise" and held that the testimony did so. The evidence showed the accident could have hapened in but two ways and that the defendant would have been liable in either event. *Burlington R. I. Ry. Co. v. Ellison, 140 Tex. 353, 167 S. W. (2d) 723; Lockley v. Page, 180 S. W. (2d) 616; Stephens, et al. v. Karr. 33 S. W. (2d) 725* each present an entirely different factual situation to the case at bar. In each case there was clearly evidence of a probative nature involved. Cer-

tainly none of them contravene the well settled law of Texas followed by the Honorable Circuit Court of Appeals for the Fifth Circuit in rendering its decision in the instant case.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated September 17, 1947.

Respectfully submitted,

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